

Temperance Kirby Spinster, Executrix of the Last Will
and Testament of Dame Jane Ormisby, Deceased;
Appellant.

Gilbert Ormisby Esq; Respondent.

The Appellant's Case :



THE Testatrix the Lady Ormisby, was Widow and Relict of Sir Edward Ormisby deceased, who was Brother to the now Respondent. She upon her Marriage with the said Sir Edward, had a Jointure in Lands, in the County of Limerick, in the Kingdom of Ireland, settled upon her, to near the value of 500 *l. per Ann.* Which she ought to have enjoyed after the Death of her said Husband: But the now Respondent Mr. Ormisby, being Heir at Law to his said Brother, was uneasy till he was in possession of the said Jointure Lands, having before that, Articled with one Thady Quin an Irish Papist to let him a Lease of some part of them for a considerable term; thereupon he prevailed upon the Lady Ormisby, to make him a Lease for Ninety nine years (if she lived so long) of the said Lands; and he undertook to pay her in lieu thereof 300 *l. per Ann.* free from all Taxes and Reprizes whatsoever.

In the year 1684, this Agreement was made, and a Lease was prepared and executed, by which the said Lands were Demised to Mr. Ormisby, he rendering back to the said Lady a yearly Rent of 300 *l.* clear of all Taxes and Payments whatsoever; and in regard this was the only Support and Maintenance that the Lady had, the Sum was made Payable every Half-year, *Viz.* on May-Day, and the Feast of All-Saints, and for due payment thereof, besides the usual Clauses for Distresses, there was inserted a Clause for the Payment of 20 *s. per Week Nomine pena*, whenever the Rent should be behind and unpaid after any of the Days of Payment; and for the said Lady's further security of recovering all Arrears, the now Respondent gave her a Bond of 1000 *l.* for performance of all the said Covenants and Agreements.

After this, Thady Quin had parcel of the said Lands in his Occupation, and one Plummer had other parcels; and the said 300 *l. per Ann.* was constantly Paid to the said Lady, by Mr. Ormisby, unto May Day 1688; but from thenceforward not one farthing has at any time been Paid, either to the Lady Ormisby in her Life-time, or to the now Appellant her Executrix, since her decease; which happened to be on or about the 11th of October 1691. So that from the said 1st of May 1688, until May-Day 1691, inclusive, which was the last Day of Payment before the said Lady's Death, there was Six Half-yearly Payments in Arrear.

For Recovery of which, the now Respondent (after she had taken upon her the burden of the Executrixship to the said Lady) was forced to put the said Bond in Suit against the now Respondent.

To avoid which, he first of all Exhibited a Bill in the Court of Chancery in Ireland, hoping from that Court to obtain an Injunction; but not finding that that Court would answer his Expectations, or else for some other Reasons hereafter appearing, he let fall his Suit in the Court of Chancery, and Filed a Bill in the Exchequer against the same Defendant, and presently after appeared himself to another Bill which was brought at the same time against him, by his Tenant Thady Quin, to pray to be Relieved against the Arrears of Rent, which were suggested to be owing to the Respondent during the same time, and which he insisted ought not to be Paid, in regard of the great Losses he the said Thady Quin had suffered in the late Wars of Ireland.

Both their Causes were brought on to a Hearing at the very same time; And a Decree was made for an Intire Abatement of all Arrears from the Feast of All-Saints, in the Year of our Lord 1688, unto the Death of Lady Ormisby.

The Respondent, by the said Decree, is to pay 150 *l.* for One half-years Rent, which was owing at All-Saints 1688, and Costs at Law, which were about 50 *s.* and 8 *d.* But upon payment hereof, the Lease and Bond are to be delivered up, and a perpetual Injunction is Decreed to Stop any farther Proceedings at Law.

Thady Quin's Decree at the same time was very much more in his favour; but that is not now before your Lordships.

But against the Decree that has been pronounced in the said Court of Exchequer in the Appellant's Cause, she now hopes by your Lordships great Justice to be relieved; not doubting but that she shall make it appear, that she ought to have had much more Decreed her than barely that 150 *l.* for Rent, and the small Costs at Law.

For notwithstanding the Arrears from Novemb. 1688, were struck off upon Account of the Common Calamities which happened in that Kingdom during the late War; yet it cannot be made out that there were any Disturbances in the County of Limerick, where these Lands lye, until after the Battle of the Boyne, which was in July 1690.

But if Thady Quin, the Tenant of the Lands, had been Plundered of all his Stock and Goods; yet it can't be thought reasonable, that all the Allowances that are to be made to Thady Quin by the Heir at Law, ought to be deducted from the Jointress, only for Landlords and Tenants: And they that have the Inheritance of Lands, and those that have but particular Estates, are usually in such Cases, and in Justice ought to be brought into a sort of Averidge, where each bears some proportion of the Losses sustained. But by this Decree Thady Quin has all the Rent which he was to pay (which was 230 *l. per Ann.*) allowed him for pretended Losses by Rapparees; Mr. Ormisby has 300 *l. per Ann.* allow'd him for making that Allowance to his Tenant Thady, and my Lady Ormisby must pay all, and bear the whole Loss her self.

But if it could be thought Justice to take away from the Lady Ormisby the whole Rent for all the time that the Troubles were in the County of Limerick, yet by what Rules in Equity can the intire Arrears be deducted that were due in those half years which happened before the Battle of the Boyne, when there was no Disturbances at all in the County of Limerick? But on the contrary, a Free Trade with France, to the Advantage of that County.

If therefore the Respondent can't make appear the great Losses he has sustained by reason of the War before July 1690, 'tis humbly hoped the whole Rent reserved shall be paid to the Appellant to May-day 1690, at the least.

And if it shall appear that Thady Quin might have waved the Possession of the Lands by vertue of a Covenant inserted in his Articles, which he would not do, but chose rather to continue Tenant, notwithstanding that Contingency of War did happen, which he had provided against; It will be presumed that the Lease he had taken was an advantageous Bargain; which being now Decreed him for 1000 Years to come, there will be little reason to believe that he has been any Loser in the main; and therefore that which has been allowed him can be looked upon no otherwise than as so much actually given him, in order to deduct it from the Appellant.

The Court of Exchequer have given the Appellant no Costs of Suit in their Court of Equity, notwithstanding by their Decreeing her 150 *l.* of the Arrears, they have adjudged she had good Cause to put the Bond in Suit, and by Consequence that all the Charges she has been put to, have been brought upon her by the Respondent's own default; for she being only an Executrix, could not remit any part of what was justly in Arrear, but was obliged to Sue for what was due to her Testatrix.

And she was brought by the Respondent into a Suit in Equity (which now-a-days is known to be very Chargeable) only for taking a legal Method for Recovering her Dues:

Therefore 'tis humbly hoped she shall be allowed her full Costs, since no body can pretend to say she has not been in the Right of all she has done.

Lastly, Since the Rent which was reserved, was the only Subsistence the Lady Ormisby had, and since even by the Decree it self, 150 *l.* is allowed to be due to her ever since May 1688, if it shall be made out to your Lordships (as it was before the said Court of Exchequer) that there have been frequent Demands made of the Arrears, and none have been tendred, as the Respondent does wrongfully suggest; It is humbly hoped that Interest shall be allowed to the Appellant, not only for the 150 *l.* but for the other Arrears, which your Lordships great Wisdom shall judge to be due to the Appellant.

Ja. Mountague.